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84-1122
CASE NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JAY HOUSTON HARMON, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether, in direct contravention of this Court's holdings in Illinois v. Gates, 103 S.Ct. 2317 (1983), Steagald v. United States, 451 U.S. 204 (1981), United States v. Crozier, 104 S.Ct. 3575 (1984), United States v. Tate, 104 S.Ct. 3575 (1984), and United States v. Cassity, 104 S.Ct. 3581 (1984), the Government may raise issues for the first time on rehearing which it had never raised in the trial court or on appeal, and about which the defense was never given the opportunity to produce evidence.

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OPINIONS BELOW

The Order of the Court of Appeals, not yet reported, denying the petitioner, Jay Houston Harmon's request for rehearing en banc, appears in the appendix hereto. The Opinion of the Court of Appeals on rehearing is also appended hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on September 27, 1984. A timely Petition for Rehearing En Banc was denied on November 15, 1984, and this Petition for Certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment 4:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The petitioner and his co-defendants below brought a Motion in the District Court for the Eastern District of Arkansas to suppress all evidence obtained as a result of the installation of an electronic tracking device in a Piper Navajo aircraft. Exclusive use of the aircraft had been obtained by Jay Houston Harmon working on behalf of John Sager.

The District Court held a suppression hearing at which time it examined the Affidavit of Thomas L. McConnell in support of his application for an Order authorizing the installation of a transponder and also

examined the magistrate's Order permitting the installation. The government never raised the issue of the good faith of the officers who executed the warrant and no evidence on this issue was presented. The District Court denied the defendants' motions, never addressing the good faith question.

The defendants were then tried and convicted and appealed their convictions in the Court of Appeals for the Eighth Circuit. Harmon challenged the warrant authorizing the transponder as well as the District Court's failure to suppress illegally obtained evidence. In an Opinion rendered May 21, 1984, the Court of Appeals found that Harmon had standing to challenge the warrant and that the warrant was invalid because McConnell's Affidavit did not state probable cause. The Judgment of Conviction of Harmon was reversed. Again, the Government did not raise, brief, or argue the issue of good faith, and this Court did not address it.

After the Court of Appeals' decision was entered, and prior to the filing of the Government's Petition for Rehearing, the United States Supreme Court rendered its Opinion in United States v. Leon, ____ U.S. ___, 104 S.Ct. 3405 (1984). The Government then petitioned for rehearing in the instant case, asking the Court to apply Leon. The defendants objected on the grounds that, by not raising these issues in the District Court, the Government had waived them.

In an Opinion rendered September 27, 1984, the original panel agreed to apply Leon, reversed itself, and affirmed the original Judgment of Conviction. Harmon then filed his Petition for Rehearing En Banc, which was denied on November 15, 1984.

REASONS FOR GRANTING THE WRIT

The Court of Appeals agreed to "rehear" issues which had never been raised in the trial court, never passed upon by the District Court

and never asserted on appeal. The Court of Appeals' grant of the Petition for Rehearing comports neither with notions of fairness nor with the established policy and precedent of the Court of Appeals or of this Court. Indeed, it is directly contrary to decisions of this Court.

Subsequent to the original panel's initial decision in the instant case, the United States Supreme Court issued its opinions in United States v. Leon, supra, and Massachusetts v. Sheppard, ____ U.S. ____, 104 S.Ct. 3424 (1984) (hereinafter designated Leon and Sheppard, respectively).

These decisions did not merely change the standard of review by which to judge evidence adduced at a suppression hearing (compare Illinois v. Gates, ____ U.S. ____, 103 S.Ct. 2317 (1983)), but, rather, changed the issues to be considered at such a hearing. Even the original panel, in its decision on rehearing, notes that:

> The proposition that Leon was a clear break with the past gives us no trouble at all.

(Slip Op., page 5) Resultantly, however, the defense was never given the opportunity to adduce facts relevant to these new issues; and neither the trial court nor the Court of Appeals was ever requested by the Government to assess the facts against these issues, until it petitioned for rehearing.

Where, as here, the issue asserted was neither raised at the trial court nor asserted on appeal, it is not the proper subject matter for a Petition for Rehearing.

This Court has long recognized the rule that questions not called to the attention of, or ruled upon by, the trial court will not be reviewed on appeal. This rule was followed most recently in Illinois v. Gates, supra, in which this Court was presented with the same issue which is presented in the instant case, and the same lack of opportunity to litigate the issues in the trial court.

In Illinois v. Gates, supra, this Court had requested the parties to address a question in addition to that presented in the Petition for Certiorari; to-wit:

> Whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment . . . should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

103 S.Ct. at 2321. Having made this request, however, the Court declined to rule on the issue, observing,

> The State never, however, raised or addressed the question whether the federal exclusionary rule should be modified in any request, and none of the opinions of the Illinois courts give any indication that the question was considered.
>
> . . . As explained below, however, we can see no reason to treat the State's failure to have challenged an asserted federal claim differently from the failure of the proponent of a federal claim to have raised that claim.
>
> We have identified several purposes underlying the "not pressed or passed upon" rule . . . First, questions not raised below are those on which the record is very likely to be inadequate

> since it certainly was not compiled with those questions in mind. (Citation excluded) Exactly the same difficulty exists when the state urges modification of an existing constitutional right or accompanying remedy. Here, for example, regarding the subjective good-faith of the police officers that searched the Gates' property which might well be an important consideration in determining whether to fashion a good-faith exception to the exclusionary rule. Our consideration of whether to modify the exclusionary rule plainly would benefit from a record containing such facts.

103 S.Ct. at 2323.

Similarly, in Steagald v. United States, 451 U.S. 204 (1981), the Government sought to avert the defendant's attempt to suppress evidence seized during a search by arguing that the defendant had no reasonable expectation of privacy in the premises which had been searched. The difficulty for the Government was, though, that it had neither raised the issue in the trial court, nor in the Court of Appeals. Rather, as in the instant case, the Government raised the issue for the first time after the Court of Appeals' decision

had been issued. The question of the defendant's expectation of privacy, this Court observed, was one of fact. Resultantly, this Court held that the Government had waived its right to raise the issue ". . . when it has failed to raise such questions in a timely fashion during the litigation." 451 U.S. at 209.

The question is not whether a court of review can search a record to find support for issues raised first on appeal; but, rather, whether the parties were given fair notice and opportunity to litigate the issues and make a relevant and complete record in the trial court.

According to this Court, the rule that issues not raised in the trial court may not be argued on appeal:

> . . . is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Hormel v. Helvering, 312 U.S. 552, 556 (1941); Singleton v. Wulff, 428 U.S. 106, 120 (1976).

In the instant case, matters which were irrelevant at the time of the suppression hearing (and which were not raised in the Court of Appeals prior to rehearing) became pivotal following the Leon and Sheppard decisions. Prior to Leon and Sheppard, a trial judge reviewing the sufficiency of an Affidavit supporting a warrant, as in this case, looked only to the four corners of the warrant. Now, however, in light of the decisions in Leon and Sheppard, previously irrelevant evidence has become admissible. Evidence of the affiant's falsehoods or reckless disregard of the truth is probative of the issue.

Because these questions were never an issue in the trial court, trial counsel were never put on notice of the necessity of adducing facts relevant to these issues.

Indeed, the conduct of the Government's prosecution of the instant cause should be contrasted with that of its prosecution in Leon and Sheppard. In the latter two cases, the Government raised the issue of the executing officer's good-faith in the trial court. Defense counsel was, thereby, put on notice of the scope of the relevant evidence. Testimony was taken on the issue and, in each instance, defense counsel was given the opportunity to rebut the evidence and the trial judge was given the opportunity to make findings of fact. The record of each of those cases contained a specific finding that the executing officer had acted in good faith. Leon and Sheppard.

On the same day the Opinions in Leon and Sheppard were issued, the United States

Supreme Court also remanded three other cases for reconsideration in light of these Opinions. United States v. Crozier, ____ U.S. ____, 104 S.Ct. 3575 (1984); United States v. Tate, 104 S.Ct. 3575 (1984); and United States v. Cassity, ____ U.S. ____, 104 S.Ct. 3581 (1984). The Court of Appeals, in its decision on rehearing in the instant case, pointed to the Supreme Court's dispositions of these cases as "sub-silentio" authority for its application of the Leon decision. These three dispositions, however, do not stand for such a proposition.

The Court's record, though not this Court's decision, in Crozier, reveals that the posture of that case on appeal was entirely different from the instant case[1] Crozier was an interlocutory appeal following the

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1. United States Court of Appeals for the Ninth Circuit Case Nos. CA 81-1355 and CA-1345 (consolidated).

suppression hearing and prior to trial. There has been no conviction from which to appeal. The Government had raised the Leon issues in the pretrial proceedings; defense counsel was on notice and had an opportunity to adduce relevant evidence. Furthermore, the trial court had been asked to rule on these issues and has done so[2].

In United States v. Tate, supra, review of the record,[3] though not this Court's decision or the majority decision in the Court of Appeals, reveals that the Leon issues had been raised in the trial court and on appeal. Again, this case does not present the issue of the Government's waiver, and should not be relied on as precedent in the instant case.

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2. This case is currently in the court of appeals, supplementary briefs having been filed in light of this Court's remand.

3. United States Court of Appeals for the

When Cassity was remanded to the Court of Appeals, the Sixth Circuit immediately remanded it to the District Court[4]. The Leon issues had not been raised in the case at any stage. Indeed, this Court's directives on the validity of warrants have changed considerably in the seven years since that prosecution began[5].

(cont.)

Ninth Circuit Case No. CA 81-1206.

4. United States Court of Appeals for the Sixth Circuit Case No. 81-1565-067; United States District Court for the Eastern District of Michigan, Southern Division Case No. 77-80932. This case has been appealed to the United States Supreme Court twice before this most recent appeal.

5. It should be noted that the Eighth Circuit's opinion in the instant case is now being relied upon by the Government in Cassity as authority for the application of Leon in spite of the

The rule regarding the waiver of issues raised neither in the trial court nor on appeal, is one which reflects sound policy and fairness. The record in the instant case is one which was created in light of issues then extant. It is not one which was created in light of the new issues, and resultantly relevant facts, raised by the United States Supreme Court's subsequent decisions in Leon and Sheppard. The Court of Appeals was not, therefore, free to search the record for whatever facts may exist to support these new issues.

Indeed, to do so would set a disturbing precedent. The original panel's decision on rehearing suggests that a criminal defendant, for example, could raise for the first time

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(cont.)

Government's failure to raise these issues earlier. See Brief of the United States on remand.

on appeal issues for which there was some support in the record, but which had never been raised and fully litigated in the trial court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Eighth Circuit.

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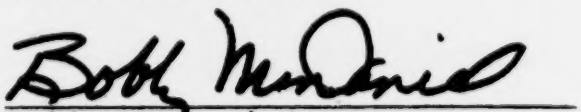

Bobby McDaniel--Attorney
for Appellant Harmon

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing pleading upon Mr. Don Curdie, Mr. Robert Erickson, Mr. Bruce Rosen, and Mr. Stephen P. Hurley, attorneys of record for all parties in this action, by placing same, properly addressed, in the mail with sufficient postage to insure delivery on January 10, 1985.

Bobby McDaniel

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 82-1592/1993-EA. September Term, 1984

UNITED STATES OF AMERICA,

Appellee,

VS. Appeals from the United States District Court for the Eastern District of Arkansas

JOHN ROGER SAGER,
JAY HOUSTON HARMON,

Appellants.

Appellants' petitions for rehearing en banc have been considered by the Court and are denied.

Petitions for rehearing by the panel are also denied.

November 15, 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NOS. 82-1592, 82-1593

No. 82-1592

United States of America,
Appellee,
v.
John Roger Sager,
Appellant.

On Appeal from the United States District Court for the Eastern District of Arkansas

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No. 82-1593

United States of America,

Appellee,

v.

Jay Houston Harmon,

Appellant.

On Petition for Rehearing

Appendix B

Submitted: August 13, 1984

Filed: September 27, 1984

Before BRIGHT, McMILLIAN, and ARNOLD, Circuit Judges.

ARNOLD, Circuit Judge.

On May 22, 1984, after oral argument, we filed our opinion in these cases. United States v. Little, 735 F.2d 1049 (8th Cir. 1984).[1] We reversed the convictions of defendants John Roger Sager and Jay Houston Harmon, holding that certain evidence introduced against them had been seized under a warrant based on an insufficient affidavit,

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1. The opinion covered appeals by three defendants: Billy Gene Little, John Roger Sager, and Jay Houston Harmon. Little's conviction was affirmed, and his case is no longer before this Court.

in violation of the Fourth Amendment, and that the case would have to be re-tried, as to these two defendants, without the tainted evidence. Our holding was of course based on the accepted principle, first announced in Weeks v. United States, 232 U.S. 383 (1914), and not contested by the government in its arguments before us, that evidence seized in violation of the Fourth Amendment may not be used in the prosecution's case in chief.

On July 5, 1984, before the time for petitioning for rehearing expired[2], the Supreme Court decided United States v. Leon, 104 S.Ct. 3405, holding that evidence seized under a warrant is admissible, even though the warrant might later be held to be based on an affidavit that failed to establish probable cause, if the officers executing the warrant reasonably relied on it. On July 10, 1984,

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2. We had extended the time on motion of the United States.

the United States filed its petition for rehearing with suggestion for rehearing en banc. The petition asks us to apply Leon to these cases, to hold that the officers' reliance on the warrant involved here was objectively reasonable, and to reinstate these convictions. Defendants, responding to the petition at our request, argue that Leon should not be applied "retroactively," that even if it is this affidavit for warrant was so plainly insufficient as not to justify any reasonable officer in relying upon it, and, in the alternative, that in any event the cases should be remanded to the District Court for an evidentiary hearing on certain issues of fact said to be relevant to the application of Leon.

The petition for rehearing is granted.[3] We

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3. This action by the panel makes the government's suggestion for rehearing en banc moot. Defendants are of course free to file a timely petition for rehearing, with or

hold that Leon does not apply to these cases, that the officers who executed the warrant in question behaved in an objectively reasonable fashion, and that no material issues of fact exist that would make an additional hearing necessary on defendants' motion to suppress. The Fourth Amendment exclusionary rule, as it has now been authoritatively defined, does not apply here, and the judgments of conviction are therefore affirmed.

I.

Leon holds that "evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant," 52 U.S.L. Week at 5161, is, in general, not to be excluded. The exclusionary rule will continue to apply, however, in certain exceptional

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(cont.)

without suggestion for rehearing en banc, directed to this, the second panel opinion in these cases.

situations: (1) "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. Franks v. Delaware, 438 U.S. 154 (1978)," 104 S.Ct. at 3421-22; (2) if "the issuing magistrate wholly abandoned his judicial role," id. at 3422, thus becoming a rubber stamp for the police; (3) if the affidavit is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' Brown v. Illinois, 422 U.S. at 610-611 (POWELL, J., concurring in part)," 104 S.Ct. at 3422; or (4) if the warrant is "so facially deficient - i.e., in failing to particularize the place to be searched or the things to be seized- that the executing officers cannot reasonably presume it to be valid," ibid. These rules, the Supreme Court says, will result in "suppression of evidence obtained pursuant to

a warrant . . . only in . . . unusual cases . . .." Id. at 3419.

The first question is whether Leon, which was not the law (or was not thought to be) when defendants' allegedly criminal conduct took place, when this warrant was issued and executed, when this case was tried, or when we initially decided this appeal, has any application at all to Harmon's and Sager's situations.[4] The defendants say no, and cite

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4. Defendants put some emphasis on the fact that the government did not question the exclusionary rule in this case until it filed its petition for rehearing. Ordinarily arguments raised for the first time on rehearing will not be considered. But here the argument is advanced in support of the judgment below, and defendants have had a full and fair opportunity to oppose it in their responses to the government's petition. We review judgments, not opinions, and we may

us to United States v. Johnson, 457 U.S. 537 (1982). Johnson was a comprehensive review of the Court's precedents with respect to retroactivity of decisions in the field of criminal procedure. The opinion in effect codifies the law of retroactivity in Fourth Amendment cases. It holds, in summary, that "a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final[5] at

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(cont.)

affirm a judgment on any ground supported by the record, whether or not that ground was urged below or passed on by the District Court.

5. Harmon's and Sager's cases were not yet final, in this sense, when Leon was decided. "Final" for this purpose means that the time for petitioning for certiorari had elapsed, or a petition for certiorari had been finally denied. See United States v. Johnson, supra, 457 U.S. at 542 n.8. The time for petitioning

the time the decision was rendered," id. at 562, with, however, certain exceptions, the most prominent of which is that a rule of criminal procedure that is "'a clear break with the past,' Desist v. United States, 394 U.S., at 248, (is) . . . almost invariably . . . nonretroactive." Johnson, 457 U.S. at 549. Leon, defendants say, was a clear break with the past, and it therefore is not to be applied retroactively to their cases.

The proposition that Leon was a clear break with the past gives us no trouble at all. But we cannot accept the rest of the defendants' argument. It rests on a reading of Johnson that takes words and phrases completely out

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(cont.)

for certiorari in this case has not yet begun to run. The finality of our judgment entered on May 22, 1984, was suspended by the government's timely filing of a petition for rehearing.

of context and attempts to fit them into a situation wholly foreign to that for which they were written. The question in Johnson was whether Payton v. New York, 445 U.S. 573 (1980), which held that the police may not enter a suspect's home to make a routine felony arrest, absent either consent or a warrant, would be applied to an arrest that took place before Payton was decided. Payton enlarged the rights of criminal defendants and tightened the limits circumscribing the conduct of the police. The heart of the retroactivity issue in Johnson, therefore, was whether police conduct that perhaps was reasonable at the time under what was then thought to be the law, should now be "penalized" by the application of a later-decided case. The same thing is true of all the other cases in this field, beginning with Linkletter v. Walker, 381 U.S. 618 (1965), the first case in which the Supreme Court held one of its own precedents in the field of

constitutional law nonretroactive.[6] In each instance the question of retroactivity related to a new decision expanding the rights of criminal defendants, and a major argument made against retroactivity was that it would disappoint the reasonable reliance of the authorities on what they thought was the law. The extent to which law-enforcement authorities had relied on the old rule was always a major consideration in deciding the question of retroactivity. See, e.g., Solem v. Stumes,

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6. "(H)eretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulation of the rule." Linkletter, 381 U.S. at 628 (footnote omitted). See also Holmes, J., dissenting, in Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910): "Judicial decisions have had retrospective operation for near a thousand years."

104 S.Ct. 1338, 1341, 1343-45 (1984); Johnson, 457 U.S. at 549.

Here, of course, the situation is reversed. The new rule (Leon) is less favorable to defendant than the old one (Weeks) and more supportive of police conduct. The authorities, far from resisting its application, seek it avidly. And application of Leon will not infringe on anyone's reliance interest. The defendants do not claim that they planned to fly drugs in from Jamaica in reliance on any set of rules having to do with the introduction of evidence in criminal cases. We faced much the same question in our prior opinion in this very case. When the warrant in question here was issued, the sufficiency of affidavits based on informants' tips was governed by the eracity and basis-of-knowledge tests set out in Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969). Almost exactly two years after the issuance of the warrant, the Supreme Court decided

Illinois v. Gates, 103 S.Ct. 2317 (1983), substituting a more flexible, totality-of-the-circumstances test, a standard considerably more indulgent towards official conduct. We held that Gates did not apply retroactively to this case and applied its rule in assessing the validity of the affidavit. We said, in words equally applicable to the question of Leon's retroactivity:

> Defendants did not plan any of their own conduct in reliance on rules of law governing the requisite specificity of affidavits for search warrants. It is therefore not unfair to them to apply the new rule.

United States v. Little, 735 F.2d at 1054 (citation omitted).

There is some recent evidence that the Supreme Court would take the same position. In Massachusetts v. Upton, 52 U.S.L. Week 3822 (U.S. May 14, 1984) (per curiam), the question presented was whether a warrant issued in 1980 was supported by an affidavit establishing probable cause. The Supreme Court upheld the

warrant, applying Gates. And in the course of its opinion the Court emphasized that Gates, far from being a mere refinement or qualification of the "two-pronged test" applied during the regime of Aguilar and Spinelli, was instead an outright rejection of that prior rule of law. Nothing in the Court's opinion gives any hint that this obviously "retroactive" application of Gates was at all out of the ordinary. Similarly, on July 5, 1984, the day Leon was decided, the Supreme Court vacated and remanded for further consideration in light of Leon several cases from the court of appeals. United States v. Cassity, 104 S.Ct. 3581; United States v. Tate, 104 S. Ct. 3575; United States v. Crozier, 104 S.Ct. 3575. This action makes no sense unless the Court intended the lower courts to apply Leon. There can be no doubt that the Court regarded its own Leon opinion as a "clear break with the past," and that it knew that such cases are not retroactive under the rules of

Johnson. There is at least a fair inference, therefore, that these vacations and remands for reconsideration represent sub silentio holdings that Leon is retroactive.[7]

We hold that the Johnson rules of retroactivity do not control in this very different area. We turn instead to the traditional rule restated in Solem v. Stumes, 104 S.Ct. at 1341; "As a rule, judicial decisions apply 'retroactively.' Indeed, a legal system based on precedent has a built-in presumption of retroactivity." (Citation

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7. In at least one of these cases, United States v. Cassity, the government's petition for certiorari, which we have obtained and examined, does not even raise the question of whether the exclusionary rule should be modified. The Supreme Court's order nevertheless invites the government to avail itself of Leon when the case gets back to the Sixth Circuit on remand.

omitted.) Leon does not apply to this case, and we now turn to a decision of whether it alters our previous decision that the evidence in question should have been excluded.

II.

Defendants contend that even if Leon applies in principle, they come within three of the exceptions contained in the Supreme Court's opinion. Specifically, they argue that this particular affidavit for warrant so clearly failed to establish probable cause that no objectively reasonable officer could have relied upon it; that the affidavit contained material misstatements of fact, either known to the affiant to be false, or included in the affidavit with reckless disregard of truth or falsity; and that the issuing magistrate was not neutral and detached, but acted as a mere "rubber stamp." In the alternative, defendants contend that they are at least entitled to an evidentiary hearing on the application of some or all of

these exceptions, and that we should not decide the issues against them on the present record.[8] We deal with each of the claimed exceptions in turn.

1. Defendants correcty point out that the government did not argue in the District Court that the officers who executed the warrant did so in "good faith." It is particularly true, therefore, that the question of the officers' subjective good faith has not been litigated. This question, of course, is one of fact, and it normally should not be decided by an appellate court, especially when no evidentiary hearing on the question has taken place. Leon, however, does not turn on "good faith" in this sense. Although courts and

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8. Defendants do not claim that the fourth Leon exception, covering warrants that on their face fail to describe the places to be searched or the persons or things to be seized with sufficient particularity, applies here.

lawyers have for some time discussed the proposed "good faith" exception to the exclusionary rule, and although Leon is said, in some short-hand descriptions, to have adopted this exception, that is not at all what the Supreme Court has done. The Court, in fact, has been at pains to explain that it is objective reasonableness, not subjective good faith, that is important. "We emphasize that the standard of reasonableness we adopt is an objective one." Leon 104 S.Ct. at 3420 n.20. "(W)e also eschew inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant. . . . (O)ur good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." Id. at 3421 n.23.

We see no reason for an additional evidentiary hearing on this issue. All of the

facts relevant to the question of objective reasonableness have been fully ventilated. Defendants do not seem to suggest any new fact relevant to this issue that is not already in the record. Application of the objective-reasonableness standard is really more akin to the application of a new legal criterion to the same facts, then it is to the decision of a new question of fact. We could of course remand to the District Court for it to determine this question in the first instance, but the record is complete, and the issue has been fully briefed, and we see no reason for such a circuitous procedure. In our view, it is entirely proper for us to address this issue and decide it on the present record.

Doing so, we have little difficulty in concluding that the officers here did not behave in an objectively reasonable fashion. Our previous opinion fully details the facts and circumstances of this case and explains at some length what we believed (and still

believe) to be the deficiencies in the affidavit. It must be said, though, that the case was a close one. Although the panel was unanimous, the District Court[9] went the other way, so it must be said here, as it was in Leon, that "(t)he affidavit . . . provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause." 104 S.Ct. at 3423. In fact, the affidavit in the case at bar bears many similarities to the affidavit involved in Leon. See id. at 3411. There, as here, some of the information in the affidavit was stale, the affidavit failed to establish the informant's credibility, and much of the conduct attributed to defendants was completely consistent with lawful behavior. We cannot say that "no reasonably

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9. The Hon. George Howard, Jr., United States District Judge for the Eastern and Western Districts of Arkansas.

well-trained police officer" reading this affidavit "could have believed that there existed probable cause" for the installation of the transponder. Id. at 3423. Defendants' claim that this first exception applies must therefore be rejected.

2. It is suggested that the affidavit contained misstatements of fact, that these misstatements were material, and that the officer either knew that certain parts of the affidavit were false or acted with reckless disregard of whether they were true or not. This of course is not a new argument. Franks v. Delaware, 438 U.S. 154 (1978), was well established in the law long before Leon. In fact, appellant Harmon devoted a considerable portion of his initial brief on this appeal to this argument. There is no occasion for another evidentiary hearing on this issue. We did not reach the Franks point in our prior opinion, since our conclusion that the affidavit, even assuming that it was

completely true, did not establish probable cause made it unnecessary to face the issue. We do face it now, and we hold that the affidavit, even with the alleged misstatements excised, would still have justified the officers' conduct in this case under the Leon standard. It is true that the affidavit contains certain inaccuracies, and that it did not include certain facts, claimed to be true by defendants, that would have thrown some doubt on the conclusion of probable cause. The District Court, however, has implicitly found that the officer who made the affidavit did not either willfully or recklessly misstate any fact. This conclusion is not clearly erroneous.

3. Defendants claim they should have an opportunity to show that the magistrate who issued the warrant abandoned his neutral and detached position and acted as a rubber stamp. The case cited by the Supreme Court in Leon to illustrate this exception is instructive.

In Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979), the magistrate actually accompanied the officers on their search:

> He allowed himself to become a member, if not the leader, of the search party which was essentially a police operation. Once in the store, he conducted a generalized search under authority of an invalid warrant; he was not acting as a judicial officer but as an adjunct law enforcement officer. When he ordered an item seized because he believed it was obscene, he instructed the police officers to seize all 'similar' items as well, leaving determination of what was 'similar' to the officers' discretion.

Id. at 327.

Defendants have not offered to prove anything of the kind here. Instead, they argue simply that the affidavit was so insufficient that any magistrate who would have acted upon it favorably must have been a rubber stamp. This is only another way of phrasing the argument that no one who relied upon the affidavit could have been objectively reasonable, an argument that we have already rejected. We do not believe that the

magistrate who issued this warrant was guilty of the kind of misconduct that the Supreme Court evidently had in mind in Leon and Lo-Ji.

III.

We reaffirm our previous holding that the affidavit was insufficient to establish probable cause, and that the magistrate's order issued in response to it was invalid. Under Leon, however, because the officers behaved themselves in an objectively reasonable fashion, the evidence seized under the unconstitutional order cannot be suppressed. Our previous direction that the convictions of Harmon and Sager be reversed is set aside on rehearing, and these convictions are now

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,

Plaintiff, AFFIDAVIT

vs.

JOHN ROGER SAGER,

Defendant.

STATE OF WISCONSIN)
)ss
COUNTY OF DANE)

NOW COMES Charles Lulling who, having been duly sworn on oath, deposes and says:

1. I am an investigator who was retained by counsel for the defendant, John Roger Sager, in the above-captioned case.

2. On July 16 through 18, 1984, I travelled to Memphis, Tennessee to examine records of the United States District Court to determine whether Magistrate Aaron Brown has ever refused to issue a search warrant when requested.

3. Upon examination of the records, I learned that the United States District Court for the district in which Magistrate Brown sits keeps no record of search warrants for which the government has made application but which have been refused by the Court. I learned, upon examination of those records, that applications for a search warrant are not numbered by the office of the Clerk of Court until such time as the application has been granted; and that application for search warrants which have been denied by the court are not filed with the clerk.

4. On January 8, 1985, I interviewed agent Thomas L. McConnell of the United States Customs Service by telephone in order to learn whether the affidavit which he had submitted in support of the application for a search warrant in the above-captioned matter had ever been rejected by a judicial officer prior to its submission to Magistrate Brown, or if the

affidavit had to be re-done and re-submitted before being signed by Brown.

5. During the same interview with agent McConnell, inquiries were posed to ascertain if Magistrate Brown had been active or possibly accompanied officers on the execution of the search warrant, but McConnell's vagueness of recall was not responsive to the inquiry.

DATED this 9th day of January, 1985.

s/ Charles Lulling
Charles Lulling

Subscribed and sworn to before me
this 9th day of January, 1985.

s/ Stephen P. Hurley
Notary Public

My commission is permanent